IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 273

FEDERAL POWER COMMISSION, *Petitioner*,

v.

H. L. HUNT; W. H. HUNT, TRUSTEE FOR HASSIE HUNT TRUST; CAROLINE HUNT SANDS; NELSON BUNKER HUNT; J. A. GOODSON, TRUSTEE FOR CAROLINE HUNT TRUST ESTATE; A. G. HILL, TRUSTEE FOR LAMAR HUNT TRUST ESTATE, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS

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INDEX

TABLE OF AUTHORITIES

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OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit (R. 323-337) is reported at 306 F. 2d 334.

JURISDICTION

The judgments of the court of appeals reversing the orders of the Federal Power Commission and remanding the proceedings were entered on July 19, 1962 (R. 338-344). A petition for rehearing filed by the Commission on August 23, 1962, was denied on April 16,

1963 (R. 344). The petition for writ of certiorari was filed on July 15, 1963, and granted on October 14, 1963 (R. 345; 375 U.S. 810). The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

QUESTION PRESENTED

Whether the court of appeals was correct in holding that, while the Commission could condition its authorization of a sale of natural gas by an independent producer under Section 7 of the Natural Gas Act upon a specific reduction in the proposed initial price, the Commission could not properly condition such authorization to preclude the producer from seeking a determination of the justness and reasonableness of his initial contract price by the filing of a rate increase application under Section 4(d) of the Act.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. §§ 717-717w, and the Commission's Regulations under the Natural Gas Act, 18 C.F.R., Subchapter E, are set out in the Appendix, *infra*, pp. 33-44.

STATEMENT

Respondents are independent producers of natural gas and, as such, their sales of gas for resale in interstate commerce are subject to regulation under the Natural Gas Act by the Federal Power Commission. The cases below arose on petitions filed by Respondents to review orders of the Commission granting Respondents temporary certificate authorization under

Section 7(c) of the Act for seven new sales of gas.[1] The orders complained of required, as a condition of sales authorization, that Respondents reduce their proposed initial price to the pipeline purchaser and, further, that they forego, pending further order of the Commission, the right to seek their contract prices under the rate changing procedures of Section 4(d) of the Act. Respondents sought review of both conditions as well as the Commission's action in rejecting rate filings which, had they been accepted, would have allowed Respondents to collect, subject to refund and after a statutory period of suspension, their initial contract prices pending a determination of the justness and reasonableness of those prices under the rate review provisions of the Act.

On review, Respondents contended that no reason existed for the first condition requiring a lowering of the initial price at which their gas would be permitted to enter the market. Respondents and other producers were then selling substantial quantities of gas to the same pipeline purchaser and to another pipeline from the same fields and, indeed, from the same wells and reservoirs, under permanent certificates issued by the

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[1] The seven sales were proposed to be made, and are now being made, from the Alvin City and Chenango Fields in Brazoria County, Texas (R. 11, 157), and from the Alta Loma Area of Galveston County, Texas (R. 83). All three fields are within Texas Railroad Commission District No. 3 and, as the court below indicated (R. 324), the sale by Hassie Hunt Trust to Natural Gas Pipeline Company of America from the Alta Loma Area may be considered as typical of the rest. This sale is made pursuant to a Gas Sales Contract dated December 15, 1960 (R. 85), and is the subject of Commission Docket No. CI61-1283. To date, none of the seven sales has been permanently certificated by the Commission, and Respondents continue to sell their gas under temporary authorization subject to the conditions complained of below.

Commission at an approved initial contract price of 20 cents per Mcf (R. 12, 80-81, 84, 96-101). The proposed new sales for which they sought certificate authorization represented, in effect, no more than a dedication of additional gas reserves to the same purchaser in the same fields at the same price, namely, 20 cents per Mcf at a pressure base of 14.65 psia. Since their initial contract price was in line with and no higher than other prices in the area, thereby eliminating the possibility of a general price rise through the triggering of "favored nation" clauses in other contracts, Respondents argued that the requirement that they lower their initial price from 20 cents to 18 cents per Mcf was without rational basis and therefore unreasonable.[2]

As to the second condition requiring that the 18-cent price be maintained in effect "for the duration of the temporary authorization and until a different prospective rate is established" (R. 114), Respondents called attention to the fact that Section 7(c) of the Act, while providing for a hearing on applications for permanent certificates of public convenience and necessity, makes no provision for when that hearing shall be held.[3] Under the circumstances, Respondents argued that a producer, who begins and is forced under the Act to continue his sale under the twofold disability of a re-

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[2] Respondents pointed out that they would in fact receive less than 20 cents per Mcf from the sales involved since they bear the cost of gathering and delivering the gas at a central delivery point in the field. Another pipeline purchasing gas from the same wells, but from other producers, bears the entire cost of gathering (R. 175, 191, 260).

[3] Compare Section 4(e) of the Act, which provides that the Commission shall give preference to rate matters "over other questions pending before it and decide the same as speedily as possible."

duced initial price and a condition prohibiting any increase in that price might materially deplete or even exhaust his gas reserve without ever being afforded the opportunity of justifying his initial contract price under either Section 7 or Section 4 of the Act.

The Commission defended the first condition requiring a 2-cent reduction in the initial price on two grounds. First, the initial price of 20 cents per Mcf called for by the contracts exceeded the guideline price of 18 cents per Mcf which the Commission had established for new sales of gas in Texas Railroad Commission District No. 3 on September 28, 1960, in its Statement of General Policy No. 61-1, 18 C.F.R. § 2.56, 24 F.P.C. 818. Secondly, assuming that all future price escalations under the contracts were approved as being just and reasonable, the weighted average price of the gas which Respondents proposed to sell over a 20-year term would be higher than any previously certificated without price condition in the area (R. 144-145, 325).[4] With respect to its second condition imposing a moratorium on rate filings, the Commission relied on the letter addressed to Respondents on November 2, 1961 (R. 144), in which it stated:

> "* * * The condition in the temporary authorization preventing you from charging or collecting more than 18¢ per Mcf during the term of that authorization without express and prior Commission approval is necessary to permit the Commission to carry out its duty to give careful scrutiny to producer prices in issuing permanent certificates. See, *e.g.*, *Atlantic Refining Co.* v. *Public*

[4] This was not true, however, with respect to Respondents' sales from the Chenango Field, which were in complete conformity with other permanently certificated sales in the area (R. 324).

Service Commission, 360 U.S. 378. If you were to be allowed to use the procedures of Section 4(d) of the Natural Gas Act during the period of your temporary authorization, the Commission could not prevent increased rates from becoming effective even though those rates might irrevocably breach the price line or trigger price increases * * *" (R. 147-148)

The court of appeals based its decision on this Court's decisions in *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378 ("*Catco*"), and *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 ("*Mobile*"). While upholding as reasonable and proper the requirement that Respondents reduce their initial price, the court held that the Commission had exceeded its statutory authority in requiring that Respondents relinquish the right to make rate filings under Section 4(d) of the Act once their sales had begun.

Rejecting the Commission's contention that a limitation on the filing of rate changes was required by the temporary and *ex parte* nature of the authorization granted Respondents, the court found that Respondents had subjected themselves fully to all of the duties and obligations of natural gas companies when they dedicated their gas to the interstate market. This being so, the court held that the Commission could not lawfully take from Respondents rights and safeguards accorded natural gas companies by the Act as a part of the duties imposed. Rather than a reasonable limitation on its grant of certificate authority, the court held that the Commission's condition amounted to a prohibition of a right expressly reserved to Respondents by Congress, namely, the right to make and change their rates in the manner prescribed by Section 4(d) of the Act.

SUMMARY OF ARGUMENT

I.

The court of appeals held that the Commission may, in the reasonable and proper exercise of its conditioning power under Section 7 of the Natural Gas Act, condition its authorization of sales of gas by independent producers upon a specific reduction in the initial price at which their gas will be permitted to enter the market. The court found, however, that the Commission exceeded its statutory authority when it sought to condition its grant of temporary sales authorization to rerequire that producers give up the right to change their rates in accordance with Section 4(d) of the Act once their sales had begun. Rejecting the argument that a limitation on the filing of rate changes was required due to the *ex parte* nature of the authorization granted, the court found that producers subject themselves fully to all of the duties and obligations of natural gas companies under the Act when they dedicate their gas to the interstate market. Rather than a reasonable limitation on its grant of certificate authority, the court held that the Commission's condition amounted to a prohibition of a right expressly reserved to natural gas companies by Congress as a part of the duties imposed, namely, the right to make and change their rates in the manner prescribed by Section 4 of the Act.

While Section 7(e) of the Act provides that the Commission may attach conditions to the certificates of public convenience and necessity which it issues, the Commission's power in this respect is not absolute. The conditions imposed must be in accord with the other provisions of the statute and must meet the test of constitutional due process. In holding that a prohibition of rate filings under Section 4(d) was unreasonable

and therefore unlawful, the court below did not suggest that the Commission's duties and responsibilities to protect the public interest under Section 7 were in any way subordinate or subservient to the rights reserved to producers under Section 4. Rather, the clear import of the court's holding was that the Commission, in seeking to fulfill the aims of the Act through the use of its conditioning power under Section 7, must do so in a manner which is not inconsistent with other provisions of the Act.

We believe that the decision below was in complete accord with the statutory scheme of regulation contemplated by Congress when it passed the Natural Gas Act. The court's holding is fully supported, moreover, by this Court's decisions in *Atlantic Refining Co.* v. *Federal Power Commission*, 360 U.S. 378 ("*Catco*"), and *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 ("*Mobile*").

In *Catco*, the Commission was admonished either to deny a certificate to the producer where the initial price appeared out of line or to so condition its grant of sales authorization as to reduce the price at which the gas would be allowed to enter the market. Citing its decision in *Mobile*, the Court held that this would not encroach on the initial rate-making power reserved to the producer but would merely serve to protect the consuming public while the justness and reasonableness of the price fixed by the parties was being determined under other sections of the Act. In so holding, the Court specifically recognized the right of the producer, once he had begun his sale, to collect his initial contract price subject to refund under Section 4(e) and found, moreover, that this would afford the consumer protection not otherwise available under Sec-

tion 5, where refunds could not be ordered. By thus giving effect to both Section 7 and Section 4, the public would be protected while preserving the remedy of the producer to protect himself from unreasonable rates.

II.

The Commission's contention that it must have the authority to declare a moratorium on rate increase filings by producers under Section 4(d) pending permanent certification or a subsequent determination of just and reasonable area rates is largely an argument of administrative convenience. Such a moratorium or rate "freeze", irrespective of its duration, is in basic conflict with the regulatory scheme of the Act.

In *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, the Court found that the intent of Congress in passing the Natural Gas Act was to underwrite just and reasonable rates to consumers of gas. That this purpose was to be accomplished under an act which did not envisage a price or rate freeze was made clear in *Bowles* v. *Willingham*, 321 U.S. 503, when the Court observed that, in contrast to a price freeze statute, the Natural Gas Act provides a scheme for fixing rates which are just and reasonable to particular persons and companies. The Court has subsequently affirmed that rates fixed by the Commission must be just and reasonable both to consumers and to natural gas companies, *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294, 310.

If, as the Court has indicated, a producer is entitled to a just and reasonable rate, it is imperative that he be permitted to change his rates in accordance with his contract under Section 4 of the Act; otherwise, he will run the risk of being forced to sell his gas at a confiscatory rate.

ARGUMENT

Introduction

This case starts, as the court below observed, with the recognition that the Commission has the power to impose reasonable terms and conditions on its grant of temporary and permanent certificate authority under Section 7 of the Natural Gas Act. Taking its text from this Court's decision in *Catco*,[5] the court of appeals found that "the necessity for conditioning a grant of a certificate is to fulfill the aims of the Act by an accommodation of all of its demands" (R. 332). Accordingly, while upholding as reasonable the Commission's requirement that Respondents reduce their initial price as a condition of beginning their sales, the court held that the Commission might not thereafter, under the guise of a certificate condition, deprive Respondents of rights accorded natural gas companies by Congress as a part of the duties imposed. Specifically, the court held that the Commission had exceeded the limits of its statutory authority under Section 7 in requiring that Respondents relinquish the right to seek their initial contract prices under Section 4(d) of the Act once their sales had begun at the lower prescribed rate.

The Commission attacks the holding below on two grounds. First, it contends that the court of appeals has misconstrued the relationship of the rate and certificate provisions of the Act in that it would subordinate the Commission's powers and responsibilities under Section 7 to the rights of a producer as declared by his contract, thereby rendering the standard of

[5] *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378.

"public convenience and necessity" subservient to the rate standard of "just and reasonable." Secondly, the Commission contends that its authority to impose reasonable certificate conditions under Section 7 must necessarily include the power to forestall and prevent the collection of higher rates by producers subject to refund under Section 4(e) pending the determination of just and reasonable producer rates in Section 5 area proceedings. Otherwise, the Commission argues, it will be unable to carry out the intent of Congress to protect the consumer from unreasonable rates and charges and, at the same time, hold the price line as it was enjoined to do by the Court in *Catco*.

In answer to these arguments, we will show that the court of appeals has correctly interpreted the relationship between the rate and certificate sections of the Act and that its interpretation in this case was in accord with and fully supported by this Court's decisions in *Catco* and other cases. We will further show that the Commission's proposed moratorium on rate change filings by producers cannot be justified as a temporary expedient pending the fixing of just and reasonable area rates under Section 5 of the Act since the concept of a rate "freeze" is in basic conflict with the regulatory scheme envisaged by Congress.

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THE AUTHORITY OF THE COMMISSION TO ATTACH REASONABLE CONDITIONS TO CERTIFICATES UNDER SECTION 7 OF THE ACT DOES NOT INCLUDE THE POWER TO NULLIFY RIGHTS AND SAFEGUARDS RESERVED TO NATURAL GAS COMPANIES BY CONGRESS UNDER SECTION 4 OF THE ACT

Section 7(e) of the Act provides that the Commission may attach conditions to the certificates of public convenience and necessity which it issues. It is clear, however, that the Commission's power to impose such conditions is not absolute. The conditions must be reasonable and have a rational basis in terms of the public convenience and necessity. Moreover, on the question of attaching conditions to temporary certificates issued to independent producers, the Tenth Circuit has delineated the scope of the Commission's power in the following language:

> "It does not follow that the broad power granted the Commission to summarily act upon applications for temporary certificates is an absolute power. If the Commission deems it in the public interest to accept an application conditionally such conditional acceptance *must be in accord with the provisions of the Act* and must meet the test of constitutional due process. * * *" *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 270 F. 2d 404, 408-09 (10th Cir. 1959) (Emphasis supplied).

In holding that the prohibition of rate filings under Section 4(d) was unreasonable and therefore unlawful the court below did not suggest, as the Commission now contends (Pet. Br. p. 29), that the Commission's power to condition certificates "must yield to an uncontrollable 'right' in a producer to file rate changes

under Section 4 and to put those changes into effect." Rather, the clear import of the court's holding was that the Commission, in seeking to fulfill the aims of the Act, must use its conditioning power in a manner which is not inconsistent with other provisions of the Act. Thus, the court held that the Commission could not use its power under Section 7 to "condition-out a statutory right which Congress has prescribed" nor could it impose conditions which "obliterate specific sections of the Natural Gas Act" (R. 323, 332). In our view, the decision below is soundly based in the regulatory scheme and is in complete accord with the decisions of this Court.

A. The Court Below Correctly Interpreted the Relationship of the Rate and Certificate Sections of the Act in Accordance With This Court's Decisions in Catco, Mobile and Other Cases

The Commission contends that the decision of the court of appeals, insofar as it affirms the right of a producer to seek, without Commission approval, a determination of the justness and reasonableness of his initial contract price "improperly subordinates the Commission's vital responsibilities under Section 7" to "the producer's rights as defined by his private contract" (Pet. Br. p. 16). The Commission argues that this limitation on its conditioning power will result in an impairment of its ability to protect consumers from excessive rates and charges by holding the price line as required by the Court's decision in *Catco*. There is no merit in this argument.

The Commission's proposed moratorium on Section 4(d) rate filings, by which it obviously seeks to avoid separate determinations of just and reasonable rates

for individual producers, is clearly inconsistent with the Court's opinion in *Catco* wherein the Court specifically recognized the right of a producer to collect his initial contract price while the justness and reasonableness of the price is being determined under Section 4(e) of the Act.

In *Catco*, the Court found that, while rates were not the only factor bearing on the public convenience and necessity, the issue of price was in that case and is generally a consideration of prime importance in the issuance of producer certificates. Noting that in the absence of a certificate condition lowering the initial rate any adjustment in price as a result of a subsequent determination of a just and reasonable rate under Section 5 of the Act would be prospective only, the Court observed that:

> "In view of this framework in which the Commission is authorized and directed to act, the initial certificating of a proposal under § 7(e) of the Act as being required by the public convenience and necessity becomes crucial. This is true because the delay incident to determination in § 5 proceedings through which initial certificated rates are reviewable appears nigh interminable. * * * This long delay, without the protection of refund, as is possible in a § 4 proceeding, would provide a windfall for the natural gas company with a consequent squall for the consumers. This the Congress did not intend. Moreover, the fact that the Commission was not given the power to suspend initial rates under § 7 makes it the more important, as the Commission itself says, that 'this crucial sale should not be permanently certificated unless the rate level has been shown to be in the public interest.' * * *" (360 U.S. at 389-90).

Accordingly, where the producer's application on its face or on the presentation of evidence signals the existence of a situation which would not be in the public interest, the Commission was admonished by the Court either to deny the permanent certificate or to condition the certificate issued in such a manner as to reduce the initial price, i.e., the rate level, at which the producer's gas would be permitted to enter the market. Where, in its discretion, the Commission chooses to condition its certificate, the Court found:

> "This is not an encroachment upon the initial rate-making privileges allowed natural gas companies under the Act, United Gas Pipe Line Co. v. Mobile Gas Service Corp. (US) supra, but merely the exercise of that duty imposed on the Commission to protect the public interest in determining whether the issuance of the certificate is required by the public convenience and necessity, which is the Act's standard in § 7 applications. *In granting such conditional certificates, the Commission does not determine initial prices nor does it overturn those agreed upon by the parties. Rather, it so conditions the certificate that the consuming public may be protected while the justness and reasonableness of the price fixed by the parties is being determined under other sections of the Act.* Section 7 procedures in such situations thus act to hold the line awaiting adjudication of a just and reasonable rate. Thus the purpose of the Congress 'to create a comprehensive and effective regulatory scheme,' Panhandle Eastern Pipe Line Co. v. Public Service Com., 332 U.S. 507, 520, 92 L. ed. 128, 139, 68 S. Ct. 190 (1947), is given full recognition. And § 7 is given only that scope necessary for 'a single statutory scheme under which all rates are established initially by the natural gas companies, by contract or otherwise, and all rates are subject to

being modified by the Commission . . . .' United Gas Pipe Line Co. v. Mobile Gas Service Corp., supra (350 U.S. at 341). On the other hand, if unconditional certificates are issued where the rate is not clearly shown to be required by the public convenience and necessity, relief is limited to § 5 proceedings, and, as we have indicated, full protection of the public interest is not afforded." (360 U.S. at 391-92) (Emphasis supplied).

In view of the foregoing language of the Court in *Catco*, it is difficult to understand how the Commission can seriously contend that the court of appeals has misconstrued or drawn incorrect inferences as to the relationship of the rate and certificate sections of the Act or how the court's decision in any way subordinates the Commission's powers under Section 7 to the rate provisions of Section 4.[6] Sections 7 and 4, described as the "heart of the Act" in *Catco* (360 U.S. at 388), are wholly compatible and, indeed, complementary sections of a single regulatory scheme. The conditioning power which the Commission insists it must now have to carry out the mandate of *Catco*

[6] In its brief (Pet. Br. p. 29), the Commission relies on the Court's decision in *Mobile*, 350 U.S. 332, for the proposition that Section 4(d) of the Act only authorizes the regulated company to file and put into effect rate changes "otherwise authorized" by the Commission. A fair reading of *Mobile* makes it clear that a natural gas company may file a rate increase under Section 4(d) if that increase is "otherwise authorized" in terms of its contract or tariff, not in terms of permission granted by the Commission under Section 7. Indeed, the clear meaning of *Mobile* was affirmed by the Court in *Catco* when it stated that a producer "may, unless otherwise bound by contract, *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, * * * file new rate schedules with the Commission" (360 U.S. at 389). The cases cited by the Commission (Pet. Br. pp. 29-32) are not inconsistent with either *Mobile* or *Catco* in this respect.

would, if anything, render Section 4 and the other sections of the Act subordinate to the provisions of Section 7(e).[7] We respectfully submit that nothing in the Court's opinion suggests such a result. Nor has the Commission's regulatory policy since *Catco* indicated any inability on the part of the Commission to carry out the Court's mandate within the framework of the Act as outlined in the Court's opinion.

Responsive to the Court's mandate in *Catco*, the Commission has, since *Catco*, held the price line in the issuance of permanent certificates to producers by what is in essence an "in line" determination based on weighted average field prices and has deferred the de-

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[7] As the court below noted (R. 337), if the Commission can suspend statutory filing rights under Section 4, it may just as well deny producers the right of review by rehearing and petition to the courts under Section 19(b) of the Act. The court observed that this possibility was not in the realm of the academic theoretical since just such a condition had been attached to temporary certificates granted producers.

Without referring directly to its so-called "Section 19" condition, the Commission attempts to meet the implications of that condition by arguing that producers starting their sales under conditioned certificates with full knowledge of the conditions involved are equitably estopped from seeking judicial review having once availed themselves of the benefits of the certificate authority (Pet. Br. pp. 38-39). In support of its argument of equitable estoppel the Commission cites *Callanan Road Improvement Co. v. United States*, 345 U.S. 507, 512. In *Callanan*, however, while holding that the transferee of conditioned certificate authority was estopped to complain of the conditions accepted by the transferor, the Court recognized that the transferor, as the original certificate holder, would have been entitled to seek judicial review "as his remedy" (345 U.S. at 513) had he done so within the time prescribed by the statute. In contrast, the Commission's Section 19 condition would preclude judicial review on the ground that the producer had received the benefits of certification, irrespective of the reasonableness of the conditions imposed.

termination of just and reasonable rates to further proceedings under Sections 4 and 5 of the Act. The Commission has followed essentially the same procedure in conditioning the prices at which it will allow producers to dedicate their gas under temporary authorization. Where the initial price set out in the producer's contract appears to be "out of line" with the guideline area price contained in the Commission's Statement of General Policy No. 61-1 (18 C.F.R. § 2.56), the Commission has uniformly conditioned the initial price in its grant of temporary authority at or below the guideline area price in the Policy Statement.

Thus, with respect to all new sales of gas by producers since the Court's decision in *Catco*, whether begun under permanent or temporary certificate authority, the Commission has followed the Court's mandate in exercising its conditioning power under Section 7 of the Act to hold the line pending a determination of just and reasonable rates under Sections 4 and 5. In so doing, the Commission has afforded consumers the full protection contemplated by the Court in *Catco*, while preserving the producer's "remedy to protect himself" (360 U.S. at 389), namely, the right to increase his rates, subject to refund, pending a determination of their justness and reasonableness under Section 4 of the Act. *Accord, Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, 156.

The Commission's insistence that it must have, at a minimum, the power to prohibit rate increase filings by independent producers amounts to an argument that consumers be afforded a greater degree of protection than the Court found in *Catco* was intended by Con-

gress.[8] It represents, moreover, an assertion by the Commission that, in the exercise of its conditioning power under Section 7 of the Act, it may suspend initial prices agreed upon by the parties, notwithstanding the Court's clear holding in *Catco* that "the Commission was not given the power to suspend initial rates under § 7" (360 U.S. at 390).

Insofar as the outright denial of a certificate is concerned, i.e., the alternative to the imposition of appropriate conditions (Pet. Br. p. 22-23), we readily concede that the Commission may, for good cause, deny a permanent certificate subject, of course, to judicial review. We do not concede, however, that because the Commission has it within its power to deny a certifi-

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[8] Citing the Court's opinion in *Federal Power Commission* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 154, as supporting a moratorium on rate increase filings by producers, the Commission argues that rate regulation under the Act is "far from a perfect tool" and that refunds to those who have been charged excessive rates in the interim, i.e., pending the determination of just and reasonable rates, constitute a "remedy of only limited effectiveness" (Pet. Br. pp. 10-11). In Tennessee, refunds were ordered only *after* a determination under Section 4(e) that the increased rates were unlawful and, while the Court noted that refunds did not constitute a perfect remedy, it did not suggest that refunds were inappropriate. Indeed, in its more recent decision in *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294, the Court observed:

> "• • • Refund obligations, it is true, do not provide as much protection as the elimination of unreasonable rates, see *Federal Power Commission* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 154-155, but they are undoubtedly significant and cannot be ignored, as some of the petitioners would have us do." (373 U.S. at 312).

In neither opinion did the Court indicate that refunds were so ineffective or inappropriate as to require that the company be prevented in the future, from filing rate changes under Section 4(d) of the Act.

cate it may impose, as an alternative to outright denial, certificate conditions which are unreasonable and therefore unlawful. Irrespective of whether the Commission denies or conditionally grants a certificate, its action must be consistent with the provisions of the Act and the requirements of due process.

B. The Legislative History of Section 7 Lends No Support for the Imposition of Certificate Conditions Which Are Inconsistent With and Override Other Provisions of the Act

The legislative history of the 1942 amendments to the Natural Gas Act, while helpful to a general understanding of the Congressional intent in adding Sections 7(c) and 7(e) to the Act, is largely irrelevant to the issue in this case.[9]

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[9] It seems clear from the Hearings Before the House Committee on Interstate and Foreign Commerce on H. R. 5249, 77th Cong., 1st Sess., that the principal concern of Congress and the Commission was with the problems of the then expanding pipeline industry and the necessity for giving the Commission jurisdiction to review and regulate pipeline expansion projects while still in their promotional stage. In commenting on the proposed amendments to Section 7, Chairman Manly of the Commission stated (p. 5):

> "In that connection, Mr. Chairman, I think it is very desirable to point out this fact, that even though under the existing section a proposed pipe line may not be under the jurisdiction of the Commission, under this certification section, during the period of its financing and construction, it does become subject to the jurisdiction of the Commission the minute it begins to operate and transport and sell natural gas, so that you are confronted with the situation under the present section that during the most important period in relation to a company—namely, the period in which it is being constructed—the Commission may have no jurisdiction whatsoever and be confronted the day it begins operation with a financial structure or with a route which may have been highly undesirable from the standpoint of the public interest."

In the first place, the scope of the Commission's inquiry into the issue of public convenience and necessity in the usual producer certificate case is limited strictly to the determination of a so-called "in line" initial price in the particular producing area with all issues other than the issue of initial price being deferred for consideration to proceedings under the rate sections of the Act (see, *infra*, pp. 26-28). Secondly, and more important, the fact that a producer chooses to seek his initial contract price under Section 4 once he has begun his sale under a temporary certificate in no way inhibits the scope of the Commission's inquiry at the time of permanent certification or its power to impose lawful conditions on the permanent certificate when issued.

Even assuming that the Commission's inquiry under Section 7 were as broad in the case of independent producers as it customarily is in the case of pipelines, the examples of pipeline certificate conditions cited by the Commission in its brief (pp. 27-28) would not support the moratorium or "price freeze" condition contended for by the Commission in this case. Thus, the Commission did not impose in any of the cases cited a certificate condition precluding the company from collecting its proposed initial price or from seeking a determination of the justness and reasonableness of its proposed price under Section 4.[10]

[10] The Commission cites its order in *Louisiana-Nevada Transit Co.*, 2 F.P.C. 546, wherein the pipeline's certificate was conditioned to provide that the same should be cancellable in the event that the company thereafter sought to increase its price above 10 cents per Mcf. The case is hardly in point since (1) it involved non-jurisdictional sales to three industrial direct sale customers, and (2) the pipeline proposed to render service at a flat rate of 10 cents per Mcf over the life of its contracts.

Nothing in the legislative history of the Act lends support for the proposition that, in the exercise of the power to attach "reasonable" terms and conditions to certificates under Section 7(e), the Commission may nullify the intent of Congress as expressed in other provisions of the Act. On the contrary, the Court has held that "all sections of the Act must be reconciled so as to produce a symmetrical whole," *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 514, a holding which repeats a fundamental rule of statutory construction applied by the Court in *United States* v. *Menasche*, 348 U.S. 528:

> "* * * 'The cardinal principle of statutory construction is to save and not to destroy.' N.L.R.B. v. Jones & L. Steel Corp., 301 U.S. 1, 30, 81 L. ed. 893, 907, 57 S. Ct. 615, 108 ALR 1352. It is our duty 'to give effect, if possible, to every clause and word of a statute,' Montclair v. Ramsdell, 107 U.S. 147, 152, 27 L. ed. 431, 433, 2 S. Ct. 391; rather than to emasculate an entire section, as the Government's interpretation requires. * * *" (348 U.S. at 538-39).

Consistent with these holdings, the Court of Appeals for the District of Columbia recently resolved an alleged conflict between the broad grant of authority in Section 16 of the Act[11] and the provisions of Sections 4(d) and (e). The court, in language pertinent to this case, held that:

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[11] Section 16 provides, in part, that "The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act." 52 Stat. 830 (1938), 15 U.S.C. § 717o.

"* * * [T]he broad power granted by this statutory language does not authorize an order, rule or regulation which would nullify or restrict the right of a natural gas company to change the rates under which it offers to furnish service, subject only to the requirement of Section 4(d) of the Act that it notify the Commission of the changes, so that it may proceed under Section 4(e). As the Supreme Court said in the Mobile opinion, 'The initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act.' An order or regulation requiring the rejection of increased rates because earlier increases were still under investigation * * * would deny to [the natural gas company] the right to change rates at which it offers service, which the Mobile decision says is the right of a natural gas company. Thus, it seems clear that such an order or regulation would amount to a legislative change which is beyond the authority of the Commission." *Willmut Gas & Oil Co.* v. *Federal Power Commission*, 294 F. 2d 245, 250 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 975.

C. The Distinction Between Temporary and Permanent Certificate Authorization Does Not Justify a Prohibition of Rights Otherwise Accorded Natural Gas Companies Under the Act

The Commission contends that, irrespective of the scope of its conditioning power with respect to permanent certificates, it may lawfully require that an independent producer selling his gas under temporary sales authorization forego the right to change his rates under Section 4 until such time as the Commission determines whether he should be granted a permanent certificate. Noting that temporary authorization is normally granted without notice or hearing, upon the

producer's *ex parte* showing of threatened economic loss, the Commission argues that no record basis exists for determining whether the proposed initial price is in line within the meaning of the Court's decision in *Catco* at the time the temporary certificate is sought. Pending a hearing under Section 7(e) to determine whether the initial price is in the public convenience and necessity and, therefore, whether a certificate should be issued, the producer must be denied access to the rate changing procedures of Section 4; otherwise, it is argued, "[t]he damage may be done even before the hearing on the application for permanent authority is held" (Pet. Br. p. 34).

The Commission's argument is erroneous for two reasons. First, as a practical matter, there is little if any distinction for the producer between temporary and permanent certificate authorization since, once he begins his sale under temporary authorization, whether at his initial contract price or at a reduced price acceptable to the Commission, he becomes as much "a captive subject to the jurisdiction of the Commission" (360 U.S. at 389) as a producer holding a permanent certificate of public convenience and necessity. As the court below noted (R. 334), he becomes subject "to all of the regulations, restraints and duties of a natural gas company," and we do not understand the Commission to contend otherwise in its brief.

As for the implication that the procedure for the issuance of temporary certificates is so summary as to increase the likelihood of improvident grants, the Commission's rules require that a producer supply all of the information needed for permanent certification

at the time he seeks temporary authorization.[12] We know of no instance where, after notice and hearing under Section 7(e), the Commission has directed the cessation of a sale begun under a temporary certificate based on a finding that the public interest did not require a continuation of the sale. Rather, the Commission has consistently taken the position that it would lack statutory authority to order an abandonment of a sale, absent the filing of an application by the producer under Section 7(b) of the Act. See, *e.g.*, *Socony Mobil Oil Co.*, 27 F.P.C. 675, 676.

The second fundamental error in the Commission's argument in support of a moratorium condition on temporary certificates involves its reliance on the Court's decision in *Catco* as requiring that it hold the price line pending the determination of the initial price issue in a subsequent hearing on the application for a permanent certificate. In *Catco*, the Court directed the the Commission to use its Section 7 conditioning power to hold the line "while the justness and reasonableness of the price fixed by the parties is being

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[12] As a prerequisite to invoking the provision for temporary authorization under Section 157.28 of the Commission's rules (18 C.F.R. § 157.28), a producer must file his sworn application for a permanent certificate of public convenience and necessity, together with a rate schedule for the proposed sale consisting of the basic contract with the pipeline purchaser and all amendments and supplements thereto. The contents of the application are described in detail in Section 157.24 of the rules (18 C.F.R. § 157.24) (see, *infra*, pp. 39-44).

As the Commission notes in its brief (p. 36n), new procedures have recently been instituted under which the Commission decides uncontested producer certificate cases without a public hearing where the initial price is at or below the area level and no protest has been filed. See FPC Press Release No. 12733, dated June 17, 1963.

determined *under other sections* of the Act" (360 U.S. at 392; emphasis supplied). The Court further held that the Commission was not required to make a determination of just and reasonable rates in a Section 7 certificate case, and the Commission has consistently refused to do so.

Since *Catco*, as we have previously indicated (*supra*, p. 21), the Commission has confined the scope of its inquiry in producer certificate cases to a determination of the "in line" weighted-average price in the area at the time the producer contract in issue was executed.[13] In so doing, the Commission has uniformly held that cost of service and financial requirements evidence, whether on an individual company or area-wide basis, is not relevant to a determination of the public convenience and necessity under Section 7.[14] That the Commission does not propose to determine just and reasonable rates in conjunction with certificate proceedings under Section 7(e) was made abundantly clear in the recently concluded Southern Louisiana omnibus certificate proceedings at Commission Docket Nos. G-13221,

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[13] *E.g.*, *Shelly Oil Co., et al.*, 28 F.P.C. 401, 411.

[14] Thus, in its recent Opinion No. 398, affirming an intermediate decision by the presiding examiner, the Commission stated:

> "• • • In particular, we affirm the decision as to its holding that economic and financial evidence, whether on an individual company or on an area-wide basis and whether of the type characterized as cost-of-service studies, cash flow studies, demand-supply, cost, profit and market price trends, area cost-revenue trends, comparative well cost data and gas replacement costs, plays no part in and is irrelevant to the determination of the initial price question in independent producer certificate cases • • • " *Placid Oil Co., et al.*, Docket Nos. G-13183, *et al.*, Opinion No. 398, issued July 17, 1963 (mimeo. p. 5).

et al.,[15] where the presiding examiner stated, in his initial decision:

> "* * * Our main interest, following the directions of *Catco*, is to halt, rather than follow, the trend of the Southern Louisiana market. In following that interest, as concluded in the prior section hereof, we adopt the method of concentrating on Commission certifications which do not express erroneous principles or pricing policies.
>
> "Of course 'This method is circular in that present Commission action is judged solely by measuring it against past Commission action.' (Continental reply brief, p. 6). If the method were to be used indefinitely, valid objection would lie. The objection does not, however, apply to a price line which is only a 'stop-gap device' with the 'objective of providing simple, direct, and effective stop-gap protection for the consuming public.' *U.G.I.* v. *F.P.C.*, *supra*, 283 F. 2d at 822, 823. We are freezing prices until the determination of the Southern Louisiana Area Rate Proceeding, and no longer. We are involved with a temporary expedient which gives no consideration to value of gas service, reasonable return, or other aspects of fair and reasonable rates. The open market's only relevance is, that it 'signals the

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[15] In severing over 360 pending producer certificate applications from the Southern Louisiana Area Rate Proceeding in Docket Nos. AR61-2, *et al.*, the Commission stated its purpose in the following language:

> "The Commission, by this order and proceeding, will be enabled to determine those initial prices which are required by the public convenience and necessity for the sale of gas in interstate commerce from the South Louisiana area, without the delay which is attendant upon the determination of just and reasonable rates. * * *". *Union Texas Petroleum, et al.*, Docket Nos. G-13221, *et al.*, Order issued December 31, 1962 (mimeo. p. 10).

existence of a situation that probably would not be in the public interest.' *Calco, supra,* 360 U.S. at 391, speaking of any application reflecting the market." *Union Texas Petroleum, et al.,* Docket Nos. G-13221, *et al.,* Initial Decision issued January 14, 1964 (mimeo. p. 50).

It would thus appear that the effect of the moratorium is the same whether applied to a temporary certificate or to a permanent certificate issued after notice and hearing under Section 7(e). In either case, Section 4 of the Act is nullified and, with it, the remedy afforded the producer to relieve himself of having to continue his sale at rates which are less than just and reasonable.[16] The condition is therefore unreasonable and beyond the power of the Commission to impose.[17]

[16] We fail to understand how the decision of the Fourth Circuit in *South Carolina Generating Co.* v. *Federal Power Commission,* 249 F. 2d 755, can support the Commission's argument in this case. There is no question here of Respondents' willingness to abide by their contracts. Moreover, Section 5 of the Natural Gas Act only provides for the institution of a rate investigation on the Commission's own motion or "upon complaint of any State, municipality, State commission, or gas distributing company." 15 U.S.C. §717d(a).

[17] The Commission's reliance on *Alabama-Tennessee Natural Gas Co.* v. *Federal Power Commission,* 203 F. 2d 494, is misplaced. In *Alabama-Tennessee,* the pipeline company, unlike Respondents below, agreed to and in fact requested the condition requiring that it maintain its interim tariff in effect during a fourteen-month period following the commencement of operations. By contrast with Respondents who were required to reduce their initial contract price pending further order of the Commission on their applications for permanent certificates, Alabama-Tennessee was allowed to collect tariff rates during its developmental period which were *higher* than those which it had originally proposed. When it sought to continue the collection of the higher interim rates at the expiration of the development period, the Commission rejected its proffered rate filing and entered upon a hearing under Sections

II.

THE MORATORIUM ON RATE INCREASE FILINGS CANNOT BE JUSTIFIED AS A STOPGAP MEASURE PENDING THE DETERMINATION OF JUST AND REASONABLE AREA RATES SINCE IT IS IN BASIC CONFLICT WITH THE REGULATORY SCHEME ENVISAGED BY CONGRESS

On analysis, the Commission's argument in support of a moratorium on rate increase filings by producers under Section 4 is nothing more than an argument of administrative convenience in furtherance of its area pricing approach to producer regulation. While undoubtedly desirable from the Commission's standpoint as a means of avoiding time-consuming individual Section 4(e) determinations of just and reasonable rates, the concept of a rate "freeze" is alien to the regulatory scheme of the Act prescribed by Congress.

In the *Hope* case,[18] the Court found that the intent of Congress in passing the Natural Gas Act was to underwrite just and reasonable rates to the consumers of natural gas. That this purpose was to be accomplished under an act which did not contemplate a rate freeze

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5 and 7 of the Act to determine not only a satisfactory form of tariff but the "just, reasonable, non-preferential [and] non-discriminatory rate" to be thereafter observed (10 F.P.C. 1638, 1640). A subsequent rate increase filing, made in the course of the hearing, was rejected on the ground that the issue of what was a just and reasonable rate for the company was then being determined. The interim rates originally proposed by the company were continued in effect until reduced at the conclusion of the hearing.

Thus, in *Alabama-Tennessee*, the Third Circuit did not have before it an order which purported to make it impossible for the company, without prior Commission consent, to seek a determination of the justness and reasonableness of its initial rate, nor did it have before it an order which prevented the pipeline from collecting its proposed initial rates pending the outcome of future proceedings.

[18] *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591.

was made clear by the Court in *Bowles* v. *Willingham*, 321 U.S. 503, decided the same term as *Hope*, when it distinguished the Natural Gas Act from a price freeze statute, declaring that the Act is a price-fixing statute in which "Congress has provided for the fixing of rates which are just and reasonable in their application to particular persons and companies" (321 U.S. at 516-17).[19]

Moreover, while recognizing in *Hope* and *Catco* that the underlying Congressional purpose was to protect the consumer from excessive charges, the Court has held that the consumer has an interest not only in the price he pays for gas but also in an assured and continuing supply of the commodity itself, *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103.[20] To that end, the Court

[19] In *Bowles* v. *Willingham*, the Court noted that a landlord who was precluded under the Emergency Price Control Act of 1942 from receiving a fair and equitable rent for his particular property had no cause to complain that the Act worked an unconstitutional taking of his property since the Emergency Act provided that "nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent" (321 U.S. at 517). In contrast, the Natural Gas Act requires that a jurisdictional sale, once begun, may not be abandoned without prior Commission approval under Section 7(b). See *Catco*, 360 U.S. at 389.

[20] In *Memphis*, the Court observed that:

> "It seems plain that Congress, in so drafting the statute, was not only expressing its conviction that the public interest requires the protection of consumers from excessive prices for natural gas, but was also manifesting its concern for the legitimate interests of natural gas companies in whose financial stability the gas-consuming public has a vital stake. Business reality demands that natural gas companies should not be precluded by law from increasing the prices of their product whenever that is the economically necessary means of keeping the intake and outgo of their revenues in proper balance; * * *" (358 U.S. at 113).

has recognized that rates fixed by the Commission must be just and reasonable both to the consumer and to the natural gas company. Most recently, in commenting on the Commission's proposed area rate proceedings, the Court said that the rates ultimately fixed should not be "so high as to deprive consumers, or so low as to deprive producers, of their right to a just and reasonable rate," *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294, 310. Finally, in *Catco* and in *Sunray*[21] the Court held that the producer's one remedy to protect himself from being required to sell his gas at a price which was less than just and reasonable and therefore confiscatory lay in his right to increase his price under Section 4(d) in accordance with his contract. While the Act would give the Commission the right to suspend the collection of the increased price for a period of five months, there is no suggestion in the legislative history of the Act or in this Court's decisions interpreting the Act that Congress intended a moratorium period of greater duration.

Assuming, as the Court has indicated, that individual producers of natural gas are entitled to recover just and reasonable rates, the impact of a condition imposing a moratorium on their right to seek their initial contract prices in the manner prescribed by Congress is immediately obvious. Under the Act, the Commission has no power to fix rates retroactively, *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618. Therefore, unless permitted to file and collect his initial contract price subject to refund under Section 4(e), the producer will be forced to await a purely prospective determination of the just-

[21] *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, 156.

ness and reasonableness of his rate in a Section 5 area proceeding. If, at the conclusion of that proceeding, it is subsequently determined that his initial contract price is just and reasonable, the producer will have been forever deprived of the just and reasonable rate to which he was entitled in the intervening period.

As an administrative agency created by Congress, the Commission has only those powers conferred by Congress.[22] In the exercise of those powers, the Commission is under a duty to give effect to all sections of the Act which it administers. Accordingly, we respectfully submit that the Commission may not, for considerations of administrative convenience, nullify Section 4 of the Natural Gas Act and, with that section, the producer's only remedy against confiscation.

CONCLUSION

For all of the foregoing reasons, the judgments of the court of appeals should be affirmed.

Respectfully submitted,

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January 29, 1964

[22] See, *e.g.*, *Civil Aeronautics Board* v. *Delta Air Lines, Inc.*, 367 U.S. 316, 322.

APPENDIX

1. The Natural Gas Act of 1938, 52 Stat. 821, as amended, 15 U.S.C. 717 *et seq.*, provides in pertinent part:

> Sec. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.
>
> (b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.
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> (c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.
>
> (d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in

any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has

not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 76 Stat. 72 (1962); 15 U.S.C. § 717c]

* * * * * * * *

Sec. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classifica-

tion, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates. [52 Stat. 823 (1938); 15 U.S.C. § 717d(a)]

* * * * * * * *

Sec. 7. (b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. [52 Stat. 824 (1938); 15 U.S.C. § 717f(b)]

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations. * * *

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f(c)]

* * * * * * * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted

thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. § 717f(e)].

• • • • • • • •

Sec. 19 (b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the

Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [former] sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, sec. 1254). [52 Stat. 831 (1938), as amended; 15 U.S.C. § 717r(b)]

2. The Commission's Regulations Under the Natural Gas Act, 18 C.F.R., Subchapter E, as amended, provide in pertinent part:

§ 157.24 Contents of applications.

(a) Every application for a certificate of public convenience and necessity required under § 157.23 shall be filed with the Commission and shall set forth in the order indicated the following:

(1) The exact legal name of the applicant; if the applicant is a corporation, the State or territory under the laws of which the applicant is organized, the location of applicant's principal place of business, and the names of all States where applicant is authorized to do business.

(2) The same data required by subparagraph (1) of this paragraph with respect to any predecessor in

interest of the applicant bona fide engaged in the transportation or sale of natural gas subject to the jurisdiction of the Commission on June 7, 1954.

(3) The name, title, and post office address of the person to whom correspondence or communications in regard to the application is to be addressed. Unless advised to the contrary, the Commission will serve all notices, orders, and other papers, service of which is required, upon the person so named.

(4) A statement of pertinent facts showing that applicant or a predecessor in interest of applicant was a natural-gas company within the meaning of the Natural Gas Act and was bona fide engaged in transportation of natural gas in interstate commerce or sale of natural gas in interstate commerce for resale on June 7, 1954, or upon commencement of the proposed transportation or sale of natural gas would be a natural-gas company. Without limitation upon the requirements of this paragraph, such statement shall include a showing of:

(i) The sources of the gas (*a*) produced by applicant or predecessor and (*b*) purchased by applicant or predecessor. In case of gas produced, give the approximate location of the fields and the points of delivery, and in the case of gas purchased, the names of the sellers and points of delivery.

(ii) The route or routes of the pipe lines over which such transportation or sale of natural gas was or will be accomplished.

(iii) Any communities served on June 7, 1954 or proposed to be served (*a*) at wholesale or (*b*) at retail.

(iv) The names of, and points of delivery to, any main line industrial customers (i.e., not located within communities under subdivision (iii) of this subpara-

graph) purchasing or proposing to purchase 25,000 Mcf or more per year. Such main line industrial customers purchasing 100,000 Mcf or more per year, shall be given the identifying designations I-1, I-2, etc., which designations shall be used in lieu of names on Exhibit A of the application (§ 157.23).

(v) Any major appurtenant properties and facilities such as compressor stations, gasoline plants, dehydration plants, purification plants, and gas storage projects.

(5) A summary, on the form indicated in § 250.0 of each contract for sale or transportation of gas for which a certificate is requested.

(b) Any information required which is already on file with the Commission may be incorporated by reference. If an applicant is unable to secure required information in time for filing with his application, a statement setting forth the reasons for his failure to file the missing information should be submitted with a request for further time, which may be granted up to 90 days.

§ 157.25 Necessary exhibits.

There shall be filed with the application as a part thereof the following exhibits:

Exhibit A. Map. Each applicant under § 157.24 shall file as a part of his application a general map or sketch of applicant's facilities for the production, transportation, or sale of natural gas as Exhibit A (§ 157.23). The map need be only of sufficient scale and in sufficient detail to show the general geographical location of the properties.

(a) The location of gas fields from which gas is or will be produced by applicant or affiliated companies or at which gas is or will be purchased by applicant.

(b) The location of applicant's principal pipe lines and the diameters thereof.

(c) The points of connection with the facilities or pipe-line systems of other companies.

(d) The designation of points of delivery of gas to applicant's system.

(e) The communities served or proposed to be served at wholesale and at retail, indicating wholesale by a small square and retail by a small circle.

(f) The designation of points of delivery of gas from applicant's system, including points of delivery to main line industrial customers purchasing 100,000 Mcf or more per year. Such main line industrial customers are to be designated I-1, I-2, etc., as indicated in § 157.24 (a) (4) (iv).

Exhibit B. Contracts. Conformed copy of each contract for sale or transportation of gas for which a certificate is requested: *Provided, however,* That contracts on file with the Commission in other proceedings may be included by reference as heretofore provided in § 157.24(b); *And provided further,* That acceptance of contracts hereunder shall not be construed as approval of the rates therein contained under Part 154 hereof or under the Natural Gas Act. On or after April 2, 1962, the application shall be rejected if any contract submitted in support thereof contains any price-changing provisions other than those defined as permissible in § 154.93 of this chapter.

§ 157.26 Form of filing.

Except with respect to the number of copies required, an application filed under § 157.23 shall be in compliance with § 1.15 and § 1.17 of this chapter, and in addition the original of the application (which shall

include the originals of all exhibits accompanying said application) shall be verified under oath by a person having knowledge of the matters therein set forth.

§ 157.27 Other information.

Upon request by the Secretary, applicant shall submit such additional data, information, exhibits, or other detail as may be specified.

§ 157.28 Temporary authorizations.

Upon the filing of an application for a certificate of public convenience and necessity under §§ 157.23 to 157.27, there also having been filed a rate schedule under §§ 154.91 through 154.102 of this chapter, an independent producer, in the event of an emergency that does not involve immediate danger to life or property, may initiate the sale or transportation of natural gas in interstate commerce and continue such sale or transportation pending final Commission action under sections 4 and 7 of the Natural Gas Act and without prejudice to such rate or other condition as may be attached to the issuance of the certificate: *Provided, however,* That this temporary authorization is applicable and available only subject to the following:

(a) It does not apply to termination of any sale or transportation or with respect to service proposed to commence more than 90 days from the date on which the temporary authorization is issued by the Commission unless otherwise ordered for good cause shown.

(b) It shall not apply unless such facilities as may be necessary to enable the purchaser of the gas or the person by whom the transportation is to be performed to accept delivery of such gas from the independent producer have been authorized by the Commission or

are exempt from the need of such authorization by virtue of the provisions of § 2.55(d) of this chapter.

(c) As part of its application hereunder, or separately, the applicant independent producer must file or have on file (1) a statement of intention to invoke this section, setting forth the facts constituting the emergency requiring such action, which emergency may include, inter alia, drainage, threatened loss of lease, flaring, economic hardship resulting from payment of shut-in royalties, or similar situations; (2) a statement identifying the contract tendered as the rate schedule intended to be effective for the sale or transportation under this temporary authorization; and (3) a statement describing, generally, the facilities necessary to enable the purchaser to take delivery of the gas proposed to be sold or transported.